not substantiated their allegation.

In the result therefore the plaintiffs are entitled to an order for possession as claimed and costs.

*Order for possession as claimed.*

Solicitors: *Mallal & Naamzie; Laycock & Ong.*

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## SHAIK ALI v. SHAIK MOHAMED

**[C.A. (Thomson C.J., Barakbah J.A., and Gill J.) October 21, 1963]**

**[K.L. — F.M. Civil Application No. 1 of 1963]**

*Practice and Procedure—Judge ordering payment of security by certain date—Further order that in default appeal to "be dismissed"—Non-compliance with order—Payment out of security for costs—Certificate of non-satisfaction—Subsequent motion to dismiss the appeal with costs—Whether first order final or interlocutory—Meaning of "be dismissed" and "stand dismissed".*

The respondent obtained judgment against the appellant, the applicant herein, and another person for the sum of $24,682.72 on January 4, 1954. The appellant lodged an appeal against this judgment after depositing $500 as security for costs. On May 31, 1954 on an application by the respondent it was ordered by Spencer Wilkinson J. sitting as a single judge of the Court of Appeal that the appellant should give security for payment of $5,453.80 (being taxed costs to be paid by the appellant to the respondent) and a further security in the sum of $1,000 (being costs of the appeal) on or before June 3, 1954. This period was extended by a further order to July 31, 1954 when the learned judge ordered that if the appellant should make default in giving such security by the date aforesaid the appeal should be dismissed with costs. The appellant did not comply with the said order. The respondent's solicitors then applied for the payment of the security of costs of $500 and by agreement with the solicitors for the appellant, $250 was paid towards the costs of the appeal and $250 towards reduction of costs in the court below. On December 7, 1954 the respondent's attorney applied for and obtained a certificate of non-satisfaction. Subsequently on December 3, 1959 the respondent filed an execution petition in the Court of the District Judge in South India for attachment and sale of the appellant's property. On February 19, 1960 the respondent applied by way of motion to the Court of Appeal for an order that the appeal be dismissed with costs. The affidavit supporting the motion stated that by the order of July 23, 1954 the appeal had only been stayed and no order had been made dismissing the appeal. On February 23, 1960 the Court of Appeal made an order dismissing the appeal. The respondent with this order proceeded with the execution petition in India and the District Judge there ordered attachment of the appellant's property on July 13, 1960. The appellant appealed against the Order of the District Judge to the High Court in Madras which adjourned the hearing to enable the appellant to make the present application to set aside the order dated February 23, 1960 on the ground that the order dated July 23, 1954 was a final order. The respondents contended that the order of July 23, 1954 was an interlocutory order because (i) if the security was paid the Court could hear the appeal and (ii) the order merely stated "be dismissed" and not "stand dismissed".

**Held:** (1) the order dated July 23, 1954 was explicit and there was no ambiguity about it. The words "be dismissed" and "stand dismissed" convey the same meaning;

(2) the respondent in applying for payment out of the security for costs and in obtaining a certificate of non-satisfaction from the Registrar had regarded the matter as at an end. The order dated February 23, 1960 should therefore be set aside.

*Cases referred to:—*

(1) *Whistler* v. *Hancock* (1878), 3 Q.B.D. 83, C.A.

(2) *Bozson* v. *Althrincham Urban District Council* [1903] 1 K.B. 547.

(3) *Ratnam* v. *Cumarasamy & Anor.* [1962] M.L.J. 330, 331.

COURT OF APPEAL.

*K. A. Menon* for the applicant.

*D. L. L. Pickard* for the respondent.

*Cur. Adv. Vult.*

**Thomson C.J.:** I have had the advantage of reading the judgment of Barakbah J.A.

I agree with the conclusions at which he has arrived and the process of reasoning by which I have arrived at them is not so different from his as to call for any lengthy statement.

I agree that the present application should be granted.

**Barakbah J.A.:** On the 4th day of January 1954, the plaintiff, who is the respondent in this application, obtained judgment against the defendant who is the appellant and another person by the name of M. S. Mohamed Sultan for the sum of $24,682.72 and costs. The appellant lodged an appeal against this judgment, after depositing $500 as security for costs.

On 31st May 1954, on the application of the respondent, Spencer Wilkinson J., sitting as a single judge of the Court of Appeal ordered the appellant to give, on or before the 30th June 1954, security for the payment of $5,453.80, being taxed costs to be paid by him to the respondent and a further security in the sum of $1,000, being costs of the appeal, also within the said period. The order further provided that unless the security was furnished on or before the said date, the appeal should be stayed.

On 23rd July 1954, again on respondent's application Spencer Wilkinson J. made a further order extending the period within which to provide the said security to 31st July 1954. The learned Judge further ordered that if the appellant should make default in giving such security by the date aforesaid the appeal be dismissed with costs.

The appellant did not comply with the said order and as alleged by the appellant the appeal stood dismissed on the 31st July 1954.

The solicitors for the respondent then applied for the payment out of the security for costs of $500 and by agreement with the solicitors for the appellant a sum of $250 was paid out towards the costs of the appeal and $250 towards reduction of the costs in the Court below. See letters dated 6th August, 7th August and 26th August 1954.

On the application of one V. N. S. Mohammed Yusof, son and attorney of the respondent, the Senior Assistant Registrar issued a certificate of non-satisfaction of the decree dated the 7th December 1954.

No execution was levied against the appellant until 3rd December 1959 when the respondent filed an execution petition in the court of the District Judge of East Thanjavur South India praying for attachment and sale of the appellant's property.

On the 19th February 1960, the respondent applied by way of motion to the Court of Appeal sitting in Penang for an order that the appeal be dismissed with costs. The affidavit supporting the motion stated that by the order dated 23rd July 1954, the appeal had only been stayed, that no order had been made dismissing the appeal and that a formal order was required "in order to proceed further in India against the appellant." It was alleged by the appellant that the real purpose of this application was to defeat the Indian Limitation Act. It should be noted that the order dated 23rd July 1954 did in fact mention "the appeal herein be dismissed with costs."

According to the appellant, he was not served with the notice of motion. His former solicitor appeared before the Court of Appeal on the 23rd February 1960 and stated that he had no instructions. As a result, the Court made an order dismissing the appeal. The respondent obtained the said order and proceeded with the execution petition in India. On 13th July 1960 the District Judge there ordered attachment of the appellant's property. Against this order the appellant preferred an appeal to the High Court in Madras which adjourned the hearing to enable the appellant to make an application to have the order of 23rd February 1960 set aside — hence this application.

In my opinion the real issue is whether the order dated 23rd July 1954 is a final order or an interlocutory order.

The learned counsel for the appellant contended that it was a final order and referred to several authorities one of which is the case of *Whistler* v. *Hancock*.[1] The head note reads:—

> "An order was made under O. XXIX, Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:—
>
> **Held:** that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claims."

In reply it was submitted that the order was not a final one because if the security were paid, the court would hear the appeal. Counsel for the respondent further stated that the order merely stated "be dismissed", not "stand dismissed"; therefore it should be an interlocutory order.

In my view, the order dated the 23rd July 1954 was explicit and there was no ambiquity about it. It appears to me that the words "be dismissed" and "stand dismissed" convey the same meaning.

In *Bozson* v. *Althrincham Urban District Council*,[2] Lord Alverstone C.J. says

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

This test was followed in the case of *Ratnam* v. *Cumarasamy & Anor*.[3] It is stated in the *Encyclopaedia of Court Forms and Precedents in Civil Proceedings* by Lord Atkin Vol. 7 at page 194 that it is essential that the order should be completed promptly as the appeal stands dismissed without further order if the order is not completed before the expiration of the time limited for giving the security. When the appellant did not comply with the said order, the respondent applied for the payment out of the security for costs of $500 and by consent $250 was paid out towards the costs of the appeal and $250 towards reduction of costs in the lower court. The respondent also obtained a certificate of non-satisfaction from the Registrar, Supreme Court. To my mind, the respondent, by his action, had regarded the matter as at an end. Therefore in my view the application should be granted and the order dated 23rd February 1960 be set aside with costs.

**Gill J.:** I have had the advantage of reading the judgment of Syed Sheh Barakbah J.A. I agree with it and agree with the order proposed that this application be granted with costs to the applicant.

*Application granted.*

Solicitors: *Braddell & Ramani; Donaldson & Burkinshaw.*